

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WILLIAM EMILIO VALENCIA, )  
Plaintiff, ) CASE NO. C14-0174-JCC-MAT  
v. )  
CAROLYN W. COLVIN, Acting ) REPORT AND RECOMMENDATION  
Commissioner of Social Security, ) RE: SOCIAL SECURITY DISABILITY  
Defendant. ) APPEAL  
\_\_\_\_\_  
)

Plaintiff William Emilio Valencia proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's application for Disability Insurance Benefits (DIB) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda, the Court recommends this matter be AFFIRMED.

## **FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1979.<sup>1</sup> He completed high school and previously

1 Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of  
Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case

01 worked as a sales clerk, shipping and receiving clerk, industrial truck operator, and construction  
 02 worker. (AR 30-31, 40.)

03 Plaintiff filed his DIB application in October 2012, alleging disability beginning  
 04 November 1, 2008. (AR 164-65.) Plaintiff remained insured for DIB through December 3,  
 05 2010 and, therefore, was required to establish disability on or prior to that “date last insured”  
 06 (DLI). *See* 20 C.F.R. §§ 404.131, 404.321. His application was denied initially and on  
 07 reconsideration, and he timely requested a hearing.

08 On February 14, 2012, ALJ M.J. Adams held a hearing, taking testimony from plaintiff  
 09 and a vocational expert (VE). (AR 35-81.) On March 22, 2012, the ALJ issued a decision  
 10 finding plaintiff not disabled. (AR 22-31.)

11 Plaintiff timely appealed. The Appeals Council denied review on December 11, 2013  
 12 (AR 1-4), making the ALJ’s decision the final decision of the Commissioner. Plaintiff  
 13 appealed this final decision of the Commissioner to this Court.

#### 14 JURISDICTION

15 The Court has jurisdiction to review the ALJ’s decision pursuant to 42 U.S.C. § 405(g).

#### 16 DISCUSSION

17 The Commissioner follows a five-step sequential evaluation process for determining  
 18 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it  
 19 must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had  
 20 not engaged in substantial gainful activity since the November 1, 2008 onset date through the  
 21 DLI. At step two, it must be determined whether a claimant suffers from a severe impairment.

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22 Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 The ALJ found plaintiff's obesity and a seizure disorder severe. Step three asks whether a  
02 claimant's impairments meet or equal a listed impairment. The ALJ found plaintiff's  
03 impairments did not meet or equal the criteria of a listed impairment.

04 If a claimant's impairments do not meet or equal a listing, the Commissioner must  
05 assess residual functional capacity (RFC) and determine at step four whether the claimant has  
06 demonstrated an inability to perform past relevant work. The ALJ found plaintiff had the RFC  
07 to lift and carry fifty pounds occasionally and twenty-five pounds frequently, stand and/or walk  
08 at least six hours in an eight-hour workday, and sit for at least six hours in an eight-hour  
09 workday. He further found plaintiff can never climb ladders, ropes, or scaffolding, and should  
10 avoid even moderate exposure to heights or hazardous machinery. With that RFC, and with  
11 the assistance of the VE, the ALJ concluded that, through the DLI, plaintiff was capable of  
12 performing past relevant work as a sales clerk or as a shipping and receiving clerk.

13 If a claimant demonstrates an inability to perform past relevant work or has no past  
14 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the  
15 claimant retains the capacity to make an adjustment to work that exists in significant levels in  
16 the national economy. Finding plaintiff not disabled at step four, the ALJ did not proceed to  
17 step five. The ALJ concluded plaintiff was not disabled at any time from the onset date  
18 through the date of the decision.

19 This Court's review of the final decision is limited to whether the decision is in  
20 accordance with the law and the findings supported by substantial evidence in the record as a  
21 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means  
22 more than a scintilla, but less than a preponderance; it means such relevant evidence as a

01 reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881  
02 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which  
03 supports the final decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278  
04 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues the ALJ erred in failing to include any limitations related to his severe seizure disorder in the RFC or in the hypothetical proffered to the VE, resulting in error in the decision at step four. He requests remand for further administrative proceedings. The Commissioner maintains the ALJ's decision has the support of substantial evidence and should be affirmed. For the reasons discussed below, the undersigned agrees with the Commissioner.

#### **Limitations Associated with Seizure Disorder**

11 Plaintiff avers error in the ALJ's failure to include any functional limitations or sequelae  
12 resulting from his severe seizure disorder in the RFC. He notes the VE's testimony that an  
13 individual would not be able to sustain competitive employment with additional RFC  
14 restrictions of "episodes periodically or sporadically, unpredictable through the work day, that  
15 would cause [him] to have down time as much as [15 to] 20 percent of the work day[,] or  
16 missing at least two days of work each month. (AR 77-79.) Plaintiff argues the ALJ  
17 improperly ignored the VE's testimony, and that an ALJ "must include some recognition of the  
18 functional limitations presented by the severe seizure disorder," and that the "inclusion of two  
19 minor environmental limitations is insufficient." (Dkt. 17 at 6.) The Court, however, finds  
20 no error established.

21 The mere fact a medical condition is deemed severe at step two does not necessitate the  
22 identification of corresponding limitations at step four. See *Bray v. Comm'r of SSA*, 554 F.3d

1219, 1228-29 (9th Cir. 2009) (“Bray offers no authority to support the proposition that a severe  
 01 mental impairment must correspond to limitations on a claimant’s ability to perform basic work  
 02 activities.”) Moreover, the ALJ did include RFC limitations associated with plaintiff’s seizure  
 03 disorder – including a prohibition on climbing ladders, ropes, or scaffolding, and a limitation to  
 04 avoiding even moderate exposure to heights or hazardous machinery. *See id.* (finding ALJ  
 05 nonetheless adequately accounted for adjustment disorder in finding plaintiff could perform all  
 06 but the most detailed and complex tasks).

Nor does plaintiff otherwise demonstrate error in the RFC assessed, the corresponding  
 08 hypothetical proffered to the VE at hearing, or the conclusion at step four. Plaintiff points  
 09 generally to the medical record, his testimony, and the testimony of a lay witness as supporting  
 10 greater limitations in his functioning. He fails, however, to either identify or demonstrate any  
 11 error in the ALJ’s assessment of any of the medical evidence or testimony.

13 A. Credibility

The rejection of a claimant’s credibility requires the provision of clear and convincing  
 14 reasons. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). “General findings are  
 15 insufficient; rather, the ALJ must identify what testimony is not credible and what evidence  
 16 undermines the claimant’s complaints.” *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996).  
 17 “In weighing a claimant’s credibility, the ALJ may consider his reputation for truthfulness,  
 18 inconsistencies either in his testimony or between his testimony and his conduct, his daily  
 19 activities, his work record, and testimony from physicians and third parties concerning the  
 20 nature, severity, and effect of the symptoms of which he complains.” *Light v. Social Sec.  
 21 Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

01       The ALJ found plaintiff to have “limited credibility” and, therefore, credited plaintiff’s  
 02 testimony as to the degree of his symptoms and limitations only to the extent reflected in the  
 03 RFC. The ALJ provided several clear and convincing reasons to support this determination.

04       1.       Unemployment benefits and work history:

05       The ALJ considered plaintiff’s work history, his use of unemployment benefits through  
 06 the second quarter of 2010, and his continued pursuit of work during that time period as  
 07 inconsistent with his application for disability benefits and detracting from his credibility as to  
 08 the severity of his symptoms. (AR 26-27 (noting, *inter alia*, plaintiff’s testimony he was laid  
 09 off from his long-term employer due to downsizing and economic difficulties, that he applied  
 10 for customer service jobs and apartment management work while unemployed, and that his  
 11 application for unemployment benefits required he attest he was ready, able, and willing to  
 12 immediately accept any suitable employment offered to him).) The ALJ concluded:

13       . . . I recognize the policy of not basing a decision of disability solely on  
 14 receiving [unemployment benefits]. However, when the following facts are  
 15 examined, the claimant appears to have little incentive to work. Social Security  
 16 records show that the claimant earned \$22,646 in unemployment benefits in  
 17 2010. A comparison of this amount against the claimant’s earnings record  
 18 shows a single year (2007) when the claimant earned more. The reality is that  
 19 the claimant has earned more while unemployed than during his other  
 productive years of gainful activity, a circumstance that cannot be ignored. His  
lengthy receipt of unemployment benefits, until January 2010 (when these  
benefits expired), while he reportedly spent his free time playing video games,  
watching television, and visiting with friends, severely detracts from his  
credibility, especially when the claimant has [been] able to work in the past  
despite his seizure impairment, and without the benefit of medication.

20 (AR 29.) Plaintiff sets forth no error in the consideration of this evidence or the ALJ’s  
 21 reasoning. *See Carmickle v. Comm’r, SSA*, 533 F.3d 1155, 1161-62 (9th Cir. 2008) (“receipt  
 22 of unemployment benefits can undermine a claimant’s alleged inability to work full-time”);

01 *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) (claimant's work history properly  
 02 considered). (*See also* AR 58 (plaintiff testified he applied for both full and part time jobs).)

03       2.     Minimal treatment:

04       The ALJ next found the medical record did not support plaintiff's testimony as to the  
 05 severity or frequency of his seizures, and indicated he could return to gainful activity. The  
 06 ALJ's discussion reasonably included consideration of the minimal medical treatment plaintiff  
 07 received, describing an initial visit to a neurologist in July 2004, followed by two medical visits  
 08 in November 2009, a return to a neurologist in December 2010, and a resumption of medical  
 09 treatment in February 2011. (AR 28.) *See Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th  
 10 Cir. 2008) (ALJ appropriately considers an unexplained or inadequately explained failure to  
 11 seek treatment or follow a prescribed course of treatment; ALJ permissibly inferred claimant's  
 12 pain was not as disabling as alleged "in light of the fact that he did not seek an aggressive  
 13 treatment program and did not seek an alternative or more-tailored treatment program after he  
 14 stopped taking an effective medication due to mild side effects.") (*See also* AR 242-315  
 15 (comprising entirety of medical record in this case).)

16       3.     Noncompliance with treatment:

17       The ALJ likewise reasonably considered plaintiff's noncompliance with repeated  
 18 recommendations to cease or decrease his alcohol consumption, and his failure to take  
 19 prescribed medication. (AR 27-28.) *See Tommasetti*, 553 F.3d at 1039. The ALJ  
 20 considered plaintiff's report that he was financially limited in his ability to pursue treatment and  
 21 medication, but reasonably found the excuse unpersuasive, noting plaintiff earned \$22,646.00  
 22 in unemployment benefits in 2010, and that he was able to financially sustain an alcohol and

01 tobacco habit during that time period. *See Molina v. Astrue*, 674 F.3d 1104, 1113-14 (9th Cir.  
 02 2012) (“[A] claimant’s failure to assert a good reason for not seeking treatment, ‘or a finding by  
 03 the ALJ that the proffered reason is not believable, can cast doubt on the sincerity of the  
 04 claimant’s pain testimony.’”) (quoted source omitted).

05       4.     Contradictory medical evidence:

06       The ALJ also pointed to the medical evidence as including, for example, EEG’s  
 07 showing generalized spike-and-wave activity consistent with epilepsy, but normal EKGs,  
 08 unremarkable neurological examinations, and consistent observations of clear speech, alert and  
 09 oriented behavior, and intact attention and memory. (AR 27-28.) The ALJ, as such, properly  
 10 considered contradiction of plaintiff’s testimony by the medical record. *Carmickle*, 533 F.3d  
 11 at 1161 (“Contradiction with the medical record is a sufficient basis for rejecting the claimant’s  
 12 subjective testimony.”).

13       5.     Inconsistency:

14       The ALJ additionally considered inconsistency between plaintiff’s testimony and his  
 15 reporting to medical providers as to the frequency and severity of his seizures. (AR 27-29.)  
 16 The ALJ described the evidence and concluded:

17       Further detracting from his credibility is that his most severe periods of his  
 18 seizure activity, as reported to medical treatment providers, were not as severe  
 19 as testified by the claimant [at] his hearing. At the hearing, he testified that he  
 20 has three to ten seizures per day, and that he requires between fifteen to sixty  
 21 minutes to fully recover from each seizure. In December 2010, he stated that  
 22 he was having two to three seizures per day, each lasting about three seconds,  
 and that he had cloudy thinking for thirty to sixty minutes following a seizure.  
 He denied any fatigue. At different points in 2011, following his use of  
 anticonvulsants, the claimant [stated] that he was having between one to five  
 seizures per week, and sometimes had weeks where none occurred. In October  
 2011, he stated that his seizures were happening three to five times per day,

lasting up to two minutes. In November 2011, to a neurologist, he again stated that he had up to five seizures per day, with minimal motor activity, and with a few minutes of sluggish behavior subsequently. These reports differ significantly from his testimony.

(AR 28-29, internal citations to record omitted.) The ALJ, as such, reasonably considered inconsistency between plaintiff's testimony and the record. *See Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001) (ALJ appropriately considers inconsistency with the evidence and a tendency to exaggerate in rejecting a claimant's testimony), and *Greger v. Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (ALJ may consider a claimant's inconsistent or non-existent reporting of symptoms). *See also* Social Security Ruling (SSR) 96-7p ("One strong indication of the credibility of an individual's statements is their consistency, both internally and with other information in the case record."))

## 6. Activities:

Finally, the ALJ found plaintiff had described activities not limited to the extent one would expect given his complaints of disabling symptoms and limitations. (AR 29.) The ALJ noted plaintiff's reports of frequent, near daily running in April and May 2011, with seizures tending to occur on days when he did not exercise, and, in June 2011, his report of "being 'very busy with traveling [and] family weddings.'" (*Id.*, citation to record omitted.) Function reports completed in October 2010 and March 2011 included reports of daily cleaning and meal preparation, playing with his children, occasional hunting and fishing, and daily video game playing. At hearing, plaintiff described an active social life and "playing video games for extended periods." (*Id.*) The ALJ reasonably found these activities to suggest minimal limitations due to plaintiff's seizures and an indication he could return to gainful work, as well

01 as inconsistency with plaintiff's testimony of disabling symptoms and limitations. *See*  
 02 *Molina*, 674 F.3d at 1112-13 ("Even where . . . activities suggest some difficulty functioning,  
 03 they may be grounds for discrediting the claimant's testimony to the extent that they contradict  
 04 claims of a totally debilitating impairment.") (citations omitted), and *Orn v. Astrue*, 495 F.3d  
 05 625, 639 (9th Cir. 2007) (describing "two grounds for using daily activities to form the basis of  
 06 an adverse credibility determination[,]” including (1) whether the activities contradict the  
 07 claimant's testimony and (2) whether the activities "meet the threshold for transferable work  
 08 skills").

09 Plaintiff, in sum, unsuccessfully relies on his testimony as demonstrating error in the  
 10 RFC, VE hypothetical, and step four conclusion.

11 B. Lay Testimony

12 Lay witness testimony as to a claimant's symptoms or how an impairment affects ability  
 13 to work is competent evidence and cannot be disregarded without comment. *Van Nguyen v.*  
 14 *Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). *But see Molina*, 674 F.3d at 1115-22 (describing  
 15 how the failure to address lay testimony may be harmless). The ALJ can reject the testimony  
 16 of lay witnesses only upon giving germane reasons. *Smolen*, 80 F.3d at 1288-89 (finding  
 17 rejection of testimony of family members because, *inter alia*, they were ““understandably  
 18 advocates, and biased”” amounted to “wholesale dismissal of the testimony of all the witnesses  
 19 as a group and therefore [did] not qualify as a reason germane to each individual who  
 20 testified.”) (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)).

21 In this case, the ALJ gave minimal weight to the testimony of plaintiff's significant  
 22 other, Reann Ruiz, “for essentially the same reason I give minimal weight to the claimant's

01 testimony.” (AR 30.) He found plaintiff’s statements to medical providers to indicate that his  
 02 seizures, even at their most severe, are not as limited as Ms. Ruiz testified, describing various  
 03 reports and finding they “differ significantly from Ms. Ruiz’s testimony that the claimant’s  
 04 seizures are so frequent that he never fully recovers.” (*Id.*) The ALJ also found medical  
 05 findings and observations inconsistent with the testimony from both plaintiff and Ms. Ruiz that  
 06 he has difficulty communicating as a result of his seizures. Finally, the ALJ pointed to  
 07 plaintiff’s reported activities to indicate his seizures have a minimal impact on his daily  
 08 functioning. The ALJ, as such, properly provided germane reasons for according little weight  
 09 to the lay testimony. *See, e.g., Carmickle*, 533 F.3d at 1164 (inconsistency between lay  
 10 statement and evidence of activities germane), and *Bayliss v. Barnhart*, 427 F.3d 1211, 1218  
 11 (9th Cir. 2005) (inconsistency between lay statement and medical evidence germane). *See*  
 12 *also Molina*, 674 F.3d at 1114 (where an ALJ provides germane reasons for rejecting the  
 13 testimony of one witness, the ALJ need only point to those reasons upon rejecting similar  
 14 testimony offered by a different witness) (citing *Valentine v. Comm'r SSA*, 574 F.3d 685, 694  
 15 (9th Cir. 2009) (because “the ALJ provided clear and convincing reasons for rejecting [the  
 16 claimant’s] own subjective complaints, and because [the lay witness’s] testimony was similar  
 17 to such complaints, it follows that the ALJ also gave germane reasons for rejecting [the lay  
 18 witness’s] testimony”)).

19 C. Medical Opinion Evidence

20 Plaintiff points to medical findings by treating physician Dr. Dinah Thyerlei, and other  
 21 medical evidence associated with his seizure disorder. (*See* Dkt. 17 at 3.) Yet, plaintiff fails  
 22 to identify any specific error in the ALJ’s consideration of that or other medical evidence. The

01 ALJ, in fact, gave significant weight to Dr. Thyerlei's opinion that plaintiff should avoid  
02 swimming, unprotected heights, and driving due to his seizures, finding the opinion consistent  
03 with both the medical record and with the opinions of state agency medical consultant Dr.  
04 Guillermo Rubio. (AR 30 (citing AR 307).) The ALJ adopted the opinions of Dr. Rubio – the  
05 only other medical opinion of record – and incorporated those opinions into the RFC. (*Id.*  
06 (citing AR 92-101).) Plaintiff, as such, demonstrates no error in relation to any medical  
07 evidence of record. *See Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1223 (9th Cir 2010)  
08 (ALJ need not provide reason for rejecting physician's opinions where ALJ incorporated  
09 opinions into RFC; ALJ incorporated opinions by assessing RFC limitations "entirely  
10 consistent" with limitations assessed by physician). For this reason, and for the reasons stated  
11 above, plaintiff fails to demonstrate any error in the RFC assessment, the corresponding  
12 hypothetical proffered to the VE, or the conclusion at step four.

## **CONCLUSION**

This matter should be AFFIRMED.

DATED this 8th day of August, 2014.

Maeve Gleeson

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Mary Alice Theiler  
Chief United States Magistrate Judge